No. 8138

In the United States Circuit Court of Appeals

For the Ninth Circuit.

LIQUID VENEER CORPORATION, a corporation,

Appellant,

vs.

LENA G. SMUCKLER,

Appellee.

APPELLANT'S PETITION FOR REHEARING.

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To the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit and the Justices thereof:

The appellant in the above entitled action now respectfully presents to your Honorable Court its petition for a rehearing after its decision of affirmance of the judgment of the trial court.

The serious error of this Honorable Court in reaching its decision of affirmance of the judgment of the trial court is due primarily, we respectfully assert, to a misapprehension of the effect of the erroneous admission of evidence as to the measure of damages during the trial and the attempted correction thereof by conflicting instructions at the close of the trial.

This is unmistakably demonstrated by the fact that there were three separate and distinct opinions written by this Honorable Court, in that, the majority opinion written by Honorable Justice Neterer stated that the evidence as to damage prior to the letter of June 2, 1931 was properly admitted; the Honorable Justice Mathews stated that the said evidence admitted for measure of damages prior to the letter of June 2, 1931 was erroneously admitted but that a certain instruction of the court set forth in his opinion cured said error; that the dissenting opinion of the Honorable Justice Wilbur stated emphatically that the said evidence admitted for the measure of damages prior to the letter of June 2, 1931 was in error and was not cured and could not have been cured.

The dissenting opinion of the Honorable Justice Wilbur clearly sets forth the facts as we see the issues and he declares:

> "I do not believe the appellant had a fair trial on the question of damages in view of the contradictory ruling of the trial judge on the subject. I think the judgment should be reversed."

The Honorable Justice Mathews in a concurring and dissenting opinion, as we see it, admits that the evidence as to damages received was in error but he thought it had been cured by the final instruction to the jury, which he points out, but we believe he does not give the same force and effect to the wording of the other instructions that he does to the specific one set out in his dissenting opinion, for all the way through the other instructions, as pointed out in the dissenting opinion of the Honorable Justice Wilbur, the jury of laymen could easily have been misled and never have understood that the court was attempting

in its final analysis of the case in the instructions to change the rulings it had made in the admission of the said evidence during the trial for the purpose of assessing damages.

For two days the trial court in its rulings led the jury to believe, and impressed upon the minds of the jurors, that the evidence as to the letters of 1928, 1929 and 1930 was all being introduced and was admissible for the purpose of showing the measure of damages and was the basis of the damage along with the letter of June 2, 1931.

It would have taken more than an ordinary layman sitting on the jury to distinguish the real difference that the court attempted to point out in its one instruction for there were apparent contradictions as the court continually referred in its instructions to "damages" and "acts" as if there had been more than one act of damage.

The jury, after hearing all the instructions with reference to the acts of damage as admitted by the court during the trial, naturally would think the court meant that the several letters that were introduced were introduced and were admissible to show separate damages for the separate years and were a basis of such damages.

The fact that there were three opinions written in this case by the three Justices who heard the argument on appeal, after studying the evidence and instructions, would indicate that the evidence and instructions must have been confusing even to legal minds, without considering what it might have been to the layman jury.

We all know how impossible it is for a jury to hear a great number of instructions read off at the close of a trial and get the fine points, in fact the turning points of the case, especially where they are told something different

in the instructions than they have been led to believe was the law during the trial and for what purpose the evidence was admitted.

The opinions written by the Honorable Justices Mathews and Wilbur clearly state that the admission of the evidence as to the measure of damages during the trial was in error.

The Honorable Justice Mathews in his opinion stated that the said error was cured by the last instruction given by the trial court, but said statement of opinion was without the citation of authorities and we submit to this Honorable Court that, based upon the hereinafter set forth authorities, the error in the admission of said evidence on measure of damages could not have been cured by the said instruction.

In the first place, the complaint for damages was based upon a letter written by the appellant, dated June 2, 1931, and the court during the process of the trial, which lasted two days before a jury, and in the presence of the jury, had the following questions come up which were all before any final instructions was given to the jury, and therefore during the course of the trial, while the evidence was coming in, the jury was advised that the evidence that was being introduced was for the purpose of assessing damages and for the measure of damages as was shown by the following statements:

> "Mr. Sheehan: Your Honor, I wish to object to that testimony and have it stricken out on the ground that this is all prior to the date of the writing of the letter in the complaint, which is dated June 1, 1931, or June 2, 1931.
>
> The Court: Mr. Balter, suppose that had been, what would be the importance of it?

Mr. Balter: Showing the measure of damages, Your Honor, now. This product French Veneer was destroyed as a business of the plaintiff on a certain date. She subsequently, maybe two or three years later, had to start all over again and try to sell a new product. We want to show the extent of the damage." [Tr. p. 156.]

"The Court: Is that the witness' statement that it was discontinued then?

Mr. Balter: Yes. I asked the witness that.

The Court: In 1929?

Mr. Balter: And for a period of several years the plaintiff had no product with May Company, and then when she did put a product on, at the suggestion of Mr. Strauss, because of reasons which he can explain, she put on a new product with a new name, meeting new sales resistance. The jury has a right to consider these elements in assessing the damages to be awarded." [Tr. p. 157.]

"Mr. Sheehan: They claim this letter that is the basis of this damage is dated June 2, 1931. Obviously, anything that transpired previously to that has no bearing on the letter because the letter was not in existence." [Tr. p. 157.]

"The Court: Let me see the file."

The Court then read the allegations of the complaint and stated:

"And the allegation is of general damage to the business of plaintiff. Why, then, is not this evidence admissible?

Mr. Sheehan: Because, Your Honor, this is three years prior to the time of writing the letter.

The Court: But the allegation in the complaint is that as a result of these various letters not confining them to any one.

Mr. Sheehan: But we are not apprised of anything else we are charged to libel except this thing that they put in here.

The Court: I think the allegation of the complaint that I have just read is clear and distinct to the effect that letters were written, is it not? Certainly it is, because I just read the allegations. Now, in the absence of a motion for particulars or something of that sort, I think the letters are admissible. They are already admitted, at any rate, and it is a matter for the jury to pass upon, to say whether the plaintiff suffered any damage, of course, and whether, if she did suffer damage, that was attributable or reasonably the result of the letters." [Tr. p. 158.]

"The Court: 'and that by reason of the said false, malicious and defamatory publication aforesaid,' singular. Now, if that is not broad enough to include all of those, because, remember that this is the basis of your damage.

Mr. Balter: Yes, Your Honor.

The Court: And if it is not broad enough to include those previous ones you can't claim damage on them.

Mr. Balter: I think it is broad enough, Your Honor. We are setting out a system by the defendant.

The Court: In the absence of a specific objection heretofore made as to what was included, or an analysis of this complaint, I would feel compelled to say that the basis of damage may reasonably be held to include all of the previous letters. Undoubtedly, I think that was the intention." [Tr. p. 160.]

Now, during the course of the trial, the above arguments and remarks of the court took place in front of the jury and naturally a jury sitting there listening to the evidence believed that the evidence, including the letters of 1928, 1929 and 1930 were all relevant as to damages, and the jury had that so firmly put in their minds by the remarks of the court that they as laymen would not be able to disregard the evidence without some real specific instruction and direction to that effect. At no place does the record show that the court withdrew the evidence or instructed the jury at any time to disregard the same. The only instruction that bears upon the subject at all was after the case was entirely over and the jury had listened to the evidence for two days as to what the damages consisted of under the court's remarks and then at the end of the trial, after argument to the jury, the court instructed them as per the instructions set out in the concurring and dissenting opinion of Judge Mathews.

The evidence clearly shows, as is so aptly set out in the dissenting opinion of Justice Wilbur, that the entire business of the plaintiff had been destroyed prior to the writing of the letters of June 2, 1931. There was not even a conflict in the evidence. She admitted that between 1928 and 1930 that she had lost her business and she become so disheartened that she gave up making her trips. Therefore, in 1931 when the letter upon which damages could be based was written she had already lost her business and there was nothing more to lose and if she had been damaged it would have been only nominal damages that could be based upon that letter, but the jury brought in a verdict of $11,000.00 compensatory damages and $9,000.00 punitive damages which shows that the jury considered the evidence of plaintiff's business during 1928,

1929, 1930 and 1931, as certainly after her business had been destroyed in 1930, as she admitted herself, there would be nothing further to destroy by writing a letter in 1931, and if the letter was written of one who had already sold their business there might be a nominal damage but it could not amount to anything more than a nominal amount as the business had already been disposed of or destroyed. There is no conflict on this evidence.

The complaint set forth the letter in *haec verba,* the letter of June 2, 1931 upon which the plaintiff claimed her damage, and of course the bringing of the suit was within one year, therefore, the defendant was not called upon, nor was it obliged to set up any statute of Limitations as all it had to do was to answer the complaint and the complaint based its damages resultant from the letter of June 2, 1931 and naturally in the answer one was not required to anticipate the plaintiff would attempt to go back into the years 1928, 1929 and 1930 for the purpose of showing damages, or of course the statute of limitations would have been set up.

We are confronted with the undisputed facts that the letter upon which the libel was based was June 2, 1931 and the admitted facts of the plaintiff that her business had been destroyed prior to that time, even to the extent that she was being supported by her sons. Therefore, the jury, even believing there had been some damage by the letter, had nothing to base any $11,000.00 damages on for compensatory damages and not having a basis for the compensatory damages, the punitive damages were out of proportion and there could be no basis therefor, all of which we believe was due to the error in admitting evidence as to damages for the years 1928, 1929 and 1930,

and the statement of the court during the process of the trial that the evidence was all admitted for the purpose of showing damages.

> "The general rule is that if evidence has been erroneously admitted during the trial, the error of its admission is cured by its subsequent withdrawal before the close of the trial or by clear peremptory instruction to the jury to disregard it. Penn. Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141; Specht v. Howard, 16 Wall. 564, 21 L. Ed. 348; Washington Gas Light Co. v. Lansden, 172 U. S. 534-555, 43 L. Ed. 543; Turner v. American Sec. Trust Co., 213 U. S. 257-267, 53 L. Ed. 788; Union Pacific Ry. v. Thomas, 152 Fed. 365-371; Balaklala Copper Co. v. Reardon, 220 Fed. 585-587; Oates v. United States, 233 Fed. 201-204; Looker v. United States, 240 Fed. 932-935. But there is an exception to this rule. It is that where the Appellate Court perceives from an examination of the record that the inadmissible evidence made such a strong impression upon the minds of the jury that its subsequent withdrawal, or the instruction to disregard it probably failed to irradicate the injurious effect of it from the minds of the jury, there the defeated party did not have a fair trial of his case and a new trial should be granted."
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> *Quigley v. United States,* 19 Fed. (2d) 756-759.

> "The general rule is that, if evidence erroneously admitted during the progress of the trial be distinctly withdrawn by the court, the error is cured; but it is otherwise if it appears that the impression made by the evidence on the jury is so strong or of such a character that it probably remains, notwithstanding the direction of the court. Washington Gaslight Co. v. Lansden, 172 U. S. 534, 19 Sup. Ct. 296, 43 L.

Ed. 543; Trockmorton v. Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663; Turner v. American Security & Trust Co., 213 U. S. 574, 29 Sup. Ct. 420, 53 L. Ed. 788; Armour & Co. v. Kollmeyer, 88 C. C. A. 242, 161 Fed. 78, 16 L. R. A. (N. S.) 1110. The testimony of Eckfeldt covers 37 pages of the record, and it bore upon the important and vital issues touching the conduct of the plaintiff and the brakeman whose acts are alleged to have given rise to the cause of action. The plaintiff, Eckfeldt, and another witness, all of whom were trespassers riding on the train without lawful right, testified substantially to the same facts, and upon their testimony the plaintiff's case practically depended. The evidence improperly admitted was not confined to some particular fact, circumstance, or feature that was brought distinctly and clearly to the attention of the jury; but it was only identified by the court by the naming of the witness. *It was so voluminous and so interwoven and connected with the mass of plaintiff's evidence as to be incapable of adequate separation, and we think it was impossible for the jury, however desirous of obeying the direction of the court, to escape entirely the influence of it."* (Italics ours.)

Chicago M. & St. P. Ry. Co. v. Newsome, 174 Fed. 394-6.

The case of *Washington Gaslight Co. v. Lansden,* 172 U. S. 534, 43 L. Ed. 543, is a very interesting case on the very points involved herein and is besides a libel case in itself, wherein there was an erroneous admission of evidence as to the wealth of one of the defendants and although the court attempted to correct its error and charged the jury that the punitive damages could not be

recovered, the Supreme Court of the United States held as follows:

> "But it is said that the error, if any, was cured by the ruling of the court in respect to the request of defendant's counsel that punitive damages should not be granted. We are not certain as to that. As we have said, the court gave no instruction to the jury that it could only consider the evidence in connection with the question of punitive damages. The remark of the court as to the object of the evidence was made to counsel and the court did not in any instruction given plainly limit the jury to its consideration for that purpose alone. The evidence was never withdrawn by the court, nor was the jury directed to take no notice of it. If the court admitted the evidence for one purpose only, and yet did not afterwards in terms withdraw it from the consideration of the jury, it was of such a nature that it still might affect the jury, even though the basis for its admission originally had disappeared. It is true the defendants did not in so many words ask the court to withdraw the evidence from the jury. It was, however, duly objected to when received and it was error to receive it. Under such circumstances, in order to cure the error, the court when deciding that punitive damages could not be recovered, should have plainly and in distinct language withdrawn the particular evidence from the jury. We cannot be certain that its effect was removed by that action of the court. In a case of this character where the line between compensatory and punitive damages is quite vague, and compensatory damages may be based upon the injury to the feelings and good name of the plaintiff, and where the amount even of such compensatory damages rests so largely in the discretion of the jury, we think it is utterly impracticable to say that, by merely charging the

> jury that punitive damages cannot be recovered, the effect of the incompetent evidence as to wealth of one of the defendants was thereby removed or that the verdict of the jury can be held to have been based solely upon the competent evidence in the case."

While the evidence in the above case concerned the difference between compensatory and punitive damages, it is very similar to the evidence in the case before this Court, where the difference is as to the evidence as to when the damages begin and we only have to look at the dissenting opinion of the Honorable Justice Wilbur of this Court to show that the plaintiff had lost her entire business and that she even quit the struggle prior to the writing of the letter of June 2, 1931. It might be hard for a jury of laymen to separate the evidence in connection with damages and any losses she might have sustained prior to the writing of the letter, and the verdict of the jury shows that they did not give the instruction as to when the damage occurred any consideration for, if one loses a business by a fire, flood or by the depression and then a letter is written that is libelous, you cannot damage a business that has already been destroyed, so it must have been that the jury gave damages for the destruction of the business during the years 1928, 1929 and 1930.

We all know the effect of the admission of certain evidence upon a jury during the trial of a case over a period of several days, and we also know that it is practically impossible to correct any error that was made in the admission of inadmissible evidence by an instruction made later, even though the jury was specifically instructed not to consider such inadmissible evidence, either at the time it was admitted, during the trial, or when the instruc-

tions were given, and even if such evidence was specifically withdrawn by the court from the consideration of the jury, and we submit to this Honorable Court that in the case at bar, where the jury was never at any time instructed that the letters of the years 1928, 1929 and 1930 admitted for the purpose of measuring damages should not be considered for that purpose and such evidence was never at any time withdrawn from the consideration of the jury, that the impossibility stated above increases to absolute impossibility.

In a case where it is plain the jury did not understand the instruction or wilfully disregarded the same, the injured party, either plaintiff or defendant, must be protected by the Appellate Courts.

The amount of the jury's verdict in this case certainly shows that, if they understood or considered the court's instruction, they utterly disregarded the same, due to the fact that they could not have possibly given a judgment in the sum of $20,000.00 based upon the letter dated June 2, 1931, as the uncontradicted evidence introduced by the plaintiff clearly shows that her home had been her place of business, even during the good times; that she had no equipment but mixed her polish in the garage at her home, so there could have been no loss in equipment. She testified her business was destroyed during the years 1928, 1929 and 1930 and that she had given up the struggle and had quit making trips, therefore, she had no business to lose after that and after the letter of June 2, 1931 was written upon which the jury could only base damages there was nothing further for her to lose and even any damages she might have had to her feelings had occurred prior to the time her business had disappeared.

Therefore, the only conclusion that can be reached is that the jury based its verdict on damages by going back over plaintiff's business for the years 1928, 1929 and 1930 and we feel that the large amount involved and the importance of the legal principles are such as to justify a further hearing herein, especially due to the fact that the verdict as given was obviously based upon inadmissible and erroneous evidence upon which this Honorable Court itself is divided as to the effect thereof.

Respectfully submitted,

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Attorneys for Appellant.

Certificate of Counsel.

I, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing is presented in good faith and in judgment of counsel for petitioner, is well founded and that it is not interposed for delay.

FRANK D. CATLIN,
Counsel for Petitioner.